



DublinWaterworld Ltd.

PAC-R-251

Correspondence 3.4
Meeting – 26/01/2012

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Mr John McGuinness
Chairman
Public Accounts Committee
Dail Eireann



18/1/12

Re: National Aquatic Centre, incorrect VAT charge.

Dear Chairman

I refer to the note dated 8th December 2011 prepared by the Revenue Commissioners for the PAC.

While the note confirms that CSID failed to apply the economic value test (EVT) legislation introduced on 25th March 2002, the note fails to deal with the issues of public interest that arose in this case. The note does not answer the queries raised by the Committee and in my view further details are required.

Please note that Revenue generally do not discuss the affairs of taxpayers with third parties. However in relation to this case, we are hereby giving permission to Revenue to openly discuss the tax affairs of Dublin Waterworld Limited in relation to VAT on the lease of the National Aquatic Centre.

I would request that this letter is sent to both Revenue and the Department of Tourism Transport and Sport (DTTS) for comment and the DTTS/NSCDA should give consent for the Revenue Commissioners to discuss the affairs of CSID/NSCDA with the Committee.

It should be remembered that the 2001 Revenue Guidelines never had legal status and were not updated to take account of the 2002 legislation. Consequently they should not have been relied upon. The guidelines did not suggest that CSID conceal the valuation report, ignore the legislation or use an exaggerated rental estimate.

In its pre invoice correspondence or indeed in its submission to the Supreme Court, CSID did not mention that it was relying on guidelines. The reference to guidelines is an argument of recent origin, lacks credibility and is wholly unsustainable.

The position that CSID adopted was both unique and incorrect and there is no professional tax advisor that we are aware of who supports CSID's position.

It should also be noted that CSID or the DTTS has yet to state what the position of its own tax advisors PwC was. It strains credulity that a "big four" accountancy firm and a leading law firm were unaware of the implications of the 2002 legislation or the risks that CSID was taking in pursuing this dubious and flawed strategy, moreover as this legislation caused widespread concern among tax advisors when it was first introduced.

It should be noted that the EVT was anti avoidance legislation designed to combat VAT planning on leases, whereby exempt bodies (such as CSID) were prevented from reclaiming VAT on uneconomic projects. It strains credulity that the Revenue Commissioners and the Department of Finance could be seen to be undermining this important anti avoidance legislation as is being suggested.

When this matter comes before the PAC again, in my view, persons from Revenue, the Valuation Office, CSID/NSCDA and PwC who are fully briefed on the matter should give evidence to the Committee. It is not sufficient for every statement made to the Committee to be caveated with a disclaimer to the effect that *"it is my understanding"*.

I also wish to bring to the attention of the Committee that I have made a number of Freedom of Information requests to CSID/NSCDA and the DTTS. These requests are being frustrated because, in my view there is a concerted effort being made to conceal the background to CSID's original request to the Valuation Office as well as the advice that CSID received from Revenue, the Department of Finance and its professional advisors PwC in relation to VAT.

The Committee should note that seven leading experts have stated, following a forensic review that CSID did not give the complete and correct lease to the Valuation Office, it also appears that CSID's tax advisors did not support a number of actions taken by CSID.

Unsurprisingly, the experts employed by DWW, who gave their opinions in 2009, well in advance of the Supreme Court Judgment, all stated that there was no basis for CSID's VAT charge because of the 2002 legislation.

The Committee should note the following facts.

- CSID (according to the Revenue Commissioners) was not a taxable person and not entitled to charge VAT in 2003 and despite this it litigated a bogus VAT charge between 2002 and 2010.
- The issue of VAT and its recoverability was of central importance to CSID and the Bertie Bowl project. CSID had not taken account of the

2002 anti avoidance legislation and the fact that the costs had to include VAT. This meant that CSID had underbudgeted the entire project.

- CSID received what the Supreme Court later described as a ***“devastating”*** valuation report. CSID and the executive services team unlawfully concealed and misrepresented this report. DWW was legally entitled to the report but repeated requests for it and supporting documents were refused.
- CSID used a grossly exaggerated rental estimate, based on incomplete and incorrect documents and misapplied the VAT legislation to purportedly charge VAT. Without the report DWW and its advisers were blindsided.
- There is no evidence that Revenue ever confirmed that CSID’s VAT charge of €10,254,600 was correct or provided a VAT assessment.
- Notwithstanding Mr O Mahony’s claim to the Committee that ***“the Revenue Commissioners, advised that it [CSID’s VAT claim] must be included”*** in the proceedings, the Revenue Commissioners only became aware of the 2005 court case ***“from newspaper reports”***.

Background.

As early as December 2000 (as recorded in the October 2004 Department of Finance reflection paper and the CSID audited accounts of 31st December 2002) Revenue had refused to confirm if CSID was a taxable person and on that basis Revenue refused CSID’s VAT refund applications in 2000, 2001, 2002 and 2003.

Revenue claimed that CSID was the state and thus not entitled to VAT refunds. Because CSID could not reclaim VAT, the cost of the Bertie Bowl project would increase by an estimated €145m and the prospects of raising private finance would be significantly reduced as well as the “commercial” feasibility of the project.

In acknowledging the differences between Revenue and CSID, PwC in a letter to Revenue dated 27th November 2002 acknowledged that they had ***“differing views on the tax point issue”***.

In fact as late as 29th April 2003 (two weeks before the €10,254,600 VAT invoice was issued) PwC on behalf of CSID was still seeking (in writing) confirmation from Revenue that CSID was ***“properly registered for VAT”***.

Despite the evidence given to the Committee, there is no evidence to suggest that Revenue confirmed that CSID was properly registered for VAT.

At the relevant time, VAT on leases was determined by Regulation 19 of the VAT Act 1979 (as amended), Section 99 of the Finance Act of 2002 (The Economic Value Test (EVT)) and the Value Added Tax (Amendment) (Property Transactions) Regulations, 2002 (see Supreme Court Judgment page 14).

In 2002 the Forbes V Tobin Supreme Court case confirmed (to those who did not know), that Revenue concessions and guidelines had no legal status and that a person from whom VAT was demanded was entitled to establish the correctness of the charge.

The Supreme Court stated that *"a person from whom value added tax is demanded..is entitled to evidence that such tax is due.. and due in the amount claimed."*

The position adopted by CSID as stated on 13th August 2003 was *"As a matter of law Dublin Waterworld is obliged to accept CSID's decision in this regard. Dublin waterworld does not have any entitlement to dispute CSID's decision"*.

CSID's plan required both disregarding the VAT legislation and preventing DWW from establishing the correctness of the charge.

The VAT legislation was clear, a person had to determine an open market price, if the open market price was less than the development cost, the EVT had failed and VAT could not be recovered. If there was no evidence of the open market price (i.e no valuation) a rent formula could be used. The rental estimate was required to be based on the "open market".

The problem for CSID was that an open market price existed, at €35m it was less than the €67m development cost and it failed the EVT.

The matter should have ended on 25th October 2002 when CSID received the valuation report. The advice received by CSID from PwC at that time is of critical importance.

The VAT situation was devastating for the whole "Bertie Bowl" project.

The Committee should be mindful that CSID proceeded in the face of anti avoidance legislation and against the 2004 advice of the AG and CAG. While the exchequer did not spend €1bn on the "Bertie Bowl", over €40m of taxpayers funds has been wasted on masterplanning. For this reason the advice provided by PwC in late 2002 is of critical importance.

CSID concealed the open market price and contrary to the legislation used a rent formula, in an attempt to meet the EVT.

Written instructions were issued that DWW was not to be made aware of the €35m figure or to receive the valuation report.

The formula used by CSID, which had no legal status, used a grossly exaggerated rental estimate (€3.3m) and produced a lease valuation of €65,664,133 (as notified by PwC to Revenue on 27th November 2002 and 6th February 2003). This too failed the EVT. Ultimately CSID used a second formula (which had no binding effect) to calculate the value of the lease to be €75m. Without the report DWW and its advisors were blindsided.

I do not believe that CSID/DTTS can with any credibility state that they believed between 2002 and 2011 that the NAC would rent for €3.3m on the open market.

Common sense would be one of the first casualties in CSID's plan.

What is even more bizarre that nine senior named individuals in the Revenue Commissioners, including members of the VAT Interpretation Division in Dublin Castle, as well as Revenue solicitors, reviewed this case and none of them noticed that the Economic Value Test (EVT) had failed.

Had any one of the nine senior persons in the Revenue Commissioners or indeed Revenue solicitors recognized or articulated the correct position then this matter might not have proceeded to the destructive dispute that ensued.

The fact is that if CSID or its advisors had any faith in the position being adopted why did they need to go to such lengths to conceal the valuation report, surely if they were acting in a bona fide manner why not simply comply with the legal requirement to provide DWW with the report and have an open and transparent discussion on the matter.

It should also be noted that at no stage in its pre invoice correspondence or indeed in its written submission to the Supreme Court did CSID state that it was relying on Revenue Guidelines. The guidelines specifically state that they do not supersede legislation.

The Supreme Court was not asked to rule or comment on Revenue Guidelines and Mr Justice Hardiman's views on guidelines were unambiguously stated.

In my view we should not have needed to go to the Supreme Court to obtain an understanding of a straightforward sentence in the legislation, but CSID with unlimited and unchecked taxpayers funds carried this dispute as far as it possibly could and went as far as rejecting the Supreme Court Judgment and seeking a new arbitration between May and August of 2010. CSID took this action without any professional support whatsoever.

The position adopted by DWW saved the exchequer €10m on the NAC project alone. If the Revenue Commissioners had an incorrect understanding of the legislation as it applied between 2002 and 2010, it is possible that a significant (and irrecoverable) loss to the exchequer has occurred on numerous property transactions where VAT has been recovered contrary to the legislation.

This was not a matter of complex legislation. In the words of the Supreme Court any person who adopted CSID's approach *"gravely misled himself on the law"*.

There is also the issue of CSID's failure to pay stamp duty on the land it received from the Department of Agriculture. This land was valued at €4.5m by the Valuation Office but there is no record of CSID having paid stamp duty.

In my experience any person in the private sector who had failed to pay stamp duty and who had incorrectly accounted for VAT over a prolonged period would face significant sanctions. Revenue's treatment of CSID appears to be both lenient and unprecedented.

What CSID actually advised Revenue.

It should be remembered that throughout this case that Revenue and CSID both had copies of the Valuation Office report, while DWW and its advisors had been repeatedly refused a copy of the report in 2002 and 2003 and did not receive it until after the litigation began in 2005.

The valuation report which CSID received from the Valuation Office stated on page 4 that the total development cost was €67,950,000. This was the value of the lease that had to be exceeded to meet the EVT.

The legislation required CSID to obtain an "open market price", but the open market price at €35m was less than the development cost of €67m and failed the EVT.

CSID would have us believe that the NAC would rent on the open market for €3.3m, when in fact it needs a similar subsidy. In fact the NAC had a 2007 turnover that was less than what CSID believed the NAC would rent for on the open market.

PwC, on behalf of CSID, wrote to Revenue on both 27th November 2002 and 6th February 2003 and stated that (using a rent formula) the value of the lease was €65,664,133. This calculation (as well as the €35m figure, which CSID/PwC did not mention to Revenue), being less than the total development cost of €67m, failed the EVT, but Revenue did not notice.

In both letters PwC referred only to Regulation 19, guidelines were not mentioned.

DWW had also stated (on a common sense approach) that the Valuation Office estimate of open market rent of €3.3m was excessive. However unlike Revenue and CSID, DWW and its advisors were not advised of the €67m figure or the €35m figure (despite repeated requests) or that the rental estimate of €3.3m was based on incomplete and incorrect documents and made by a valuer who (it would later emerge) had faked his professional qualifications and according to seven experts had not read or received the lease he valued.

DWW met and corresponded with Revenue in 2003 and 2005, but Revenue failed to recognize the correct position, to take DWW's concerns on board or indeed to state that the EVT had failed or indeed that CSID was not a taxable person.

However to be fair to Revenue they did state that VAT was a self assessment tax and they refused to confirm if CSID's approach or VAT charge was correct.

On the 30th April 2003 Revenue asked CSID to confirm if DWW *"has accepted the valuation of the unencumbered rent as determined by the Valuation Office"*. CSID knowing that DWW had vigorously disputed the estimate refused to answer the question.

Revenue also repeatedly advised CSID in early 2003 that a procedure known as the Section 4A procedure was not available to CSID and specifically stated *"as already stated CSID is not entitled to benefit from the provisions of Section 4A"*, but nonetheless CSID issued such a document on 29th April 2003 and articulated in the High Court in 2005 that DWW's refusal to sign this form was unreasonable.

In 2005 when the matter went to Court, Revenue Solicitors (15th June 2005) sought a copy of CSID's statement of claim and pleadings. Despite the fact that CSID claimed to have a Revenue assessment (which did not exist) and CSID was relying on procedures (Section 4A) expressly forbidden by Revenue (29th April 2003), Revenue stood idly while DWW was relentlessly prosecuted to the point of the directors of DWW being put under the threat of disqualification under Section 214 of the Companies Act.

CSID/DTTS's claims concerning Revenue

CSID claimed in a letter to DWW dated 13th August 2003 (copied to Mr Donagh Morgan, CEO and Mr Con Haugh, Serretary General of the DAST) that *"The Revenue have already accepted that the valuation of the VAT is correct"*.

On the 31st October 2003 CSID provided to DWW a partially redacted Revenue fax in a clear attempt to misrepresent the position of the Revenue Commissioners. Far from acting in open and transparent manner CSID deleted information *"which is confidential"* to CSID.

The deleted information was a comment by the inspector on 1st May 2003 that *"I am not aware that Dublin Waterworld Ltd has accepted the valuation of the unencumbered rent"*. This was following the Revenue query of 30th April 2003 whereby Revenue asked CSID to *"please confirm that the proposed lessee, Dublin Waterworld Ltd has accepted the valuation of the unencumbered rent as determined by the Valuation Office."*

CSID refused to answer the question because CSID knew that DWW's valuer, Savills, had described the Valuation Office rental estimate in December 2003 as *"not accurate or sustainable"*, but CSID could not let this fact come to the attention of Revenue as it would have ended the scam.

DWW had repeatedly objected in writing to the Valuation Office estimate of rent on dates including 9/12/02, 17/12/02, 6/1/03, 18/2/03, 24/2/03, 25/4/03, 15/5/03, 1/8/03.

In its 2005 statement of claim to the High Court and in Mr Donagh Morgan's First Affidavit of 26th April 2005, it is stated that ***"the amount of VAT due and assessed by the Revenue Commissioners is the sum of €10,254,600"***.

There is no evidence whatsoever to suggest that Revenue ever provided such an assessment and CSID has to date failed to produce it.

The fact is that the Revenue Commissioner did not accept the rental estimate and consequently they did not accept the VAT amount of €10,254,600.

In his evidence to the PAC on 8th November 2011 Mr Tom O Mahony, Secretary General of the DTTS, **having read the files**, repeatedly stated that Revenue had advised both CSID and the Department of Finance that the VAT claim had to be included in the proceedings.

Mr O Mahony's claim is contradicted by both the Revenue Solicitors letter of 15th June 2005 whereby Revenue only became aware of the litigation following ***"newspaper reports"*** and also by Freedom of Information requests to both his own department and the Department of Finance, these requests have shown that ***"the Department has no such records"***.

In fact in May 2005, two months after the proceedings had begun, PwC were still attempting to negotiate with Revenue an exit plan following the 2004 suggestion of the CAG and AG. DWW was unaware of these discussions and they were not brought to the attention of the High Court. The consistent position adopted by Revenue was that VAT was a self assessment tax and ***"a matter for the transferor"*** and this was made clear in a meeting attended by Mr Donagh Morgan on 1st June 2004.

Mr O Mahony should clarify his position and statements to the Committee and provide copies to the Committee of the following documents that he referred to.

- ***"Having consulted with the Revenue Commissioners, it was then reported that there was not even an option here"*** [page 21]
- ***"The legal advice of both the advisers of Campus and Stadium Ireland Development Company, CSID, and of the Attorney General, the financial advice of the CSID's advisers, of the department of Finance and of the Revenue Commissioners all stated exactly the same thing, namely the VAT claim must be included"***. [page 21]
- ***"Their advice [Revenue and the Department of Finance, page 22] was that legally we could not do what the Attorney General had stated we should do"***
- ***"That advice [The AG's advice that the EVT had failed, page 22] in 2004 was superceded by subsequent advice"***

- ***“There was a 2004 letter from the Attorney General which was superceded by 2005 advice which said otherwise”*** [page 25]
- ***“Strong as the wording of the 2004 letter from the Attorney General may be, it overturned its position on the issue in 2005”*** [page 29].
- ***“In 2005, as I stated, the campus authority was told by the Office Of The Attorney General, Revenue and the Department of Finance that it was required to pursue the VAT”*** [page 37].

In view of the very significant amount of taxpayer's money that has been lost and the potential loss that would have occurred if CSID defeated the EVT legislation this is a matter which should be clarified in writing by both Revenue and the DTTS and Mr O Mahony should supply copies of the documents to which he referred to the PAC.

Prior to Mr O Mahony's evidence to the Committee, CSID has not previously claimed that the Revenue Commissioners advised the Department of Finance/DAST/CSID in relation to the VAT dispute at the NAC.

On the 14th February 2005 Mr Donagh Morgan advised the DAST that ***“we are not having any success in securing a meeting with the Office of the Revenue Commissioners to even discuss a possible resolution of the matter.”***

It is also recorded that Revenue advised CSID on 23rd February 2005 that ***“a meeting at this stage will not serve any purpose”***.

In fact four days before proceedings began (14th March 2005) CSID confirmed in writing that ***“we do not have a formal response from the Department of Finance”***.

Mr O Mahony's evidence indicates at some point between 15th and 18th March 2005 the Revenue not only granted a meeting but gave strict instructions that the VAT amount ***“must be included”*** and in addition the Attorney General reversed his 2004 advice that the economic value test had failed and the Department of Finance issued its instructions.

In my view there no evidence to support Mr O Mahony's statement to the PAC.

What Revenue Guidelines actually say:

The Supreme Court Judgment states on page 12 ***“the Revenue document carries the disclaimer, in a prominent place at the end of the introduction: “Nothing in this guide should be taken as overriding the legal provisions or requirements of the Value Added Tax Act 1972 (as amended).”***

It is clear to any reasonable person that the legislation takes precedence. CSID's defence that it was somehow relying on guidelines is of recent original and does not stand up to scrutiny.

The guidelines to state in Section 2.2.2 that where the rent is related to profits (as it was at the NAC) then the valuation must be determined by a valuation by a competent valuer.

CSID had such a valuation, (€35m) but they chose to ignore it. In its extensive correspondence with DWW during 2002 and 2003 CSID refused to provide a copy of the valuation and failed to mention the existence of the €35m.

If a rent formula is allowable and used, the guidelines specifically require the use of the lesser figure. The lesser figure (€65,445,133) notified by PwC to Revenue on both 27th November 2002 and 6th February 2003 was less than the development cost of €67,950,000 and it too failed the EVT.

Of critical importance is the exact advice that CSID received from PwC in late 2002.

What is clear in this case is that CSID was intent on charging VAT regardless of the legality or consequences for any other party.

Key questions for the Revenue Commissioners.

1. What was the status of the 2001 Revenue Guidelines when CSID issued its invoice on 15th May 2003?
2. Did CSID act appropriately in refusing to provide DWW with the valuation report and the supporting documentation.
3. In the opinion of the Revenue Commissioners was CSID's VAT invoice for €10,254,600 a valid VAT invoice when it was issued on 15th May 2003?
4. Did Revenue ever confirm that CSID was a taxable person and properly registered for VAT following PwC's requests on dates including 29th April 2003?
5. Did the Revenue Commissioners provide an assessment or confirmation that the VAT of €10,254,600 charged to DWW was correct and did Revenue provide advice to CSID and/or the Department of Finance in relation to the inclusion of the VAT amount in legal proceedings?
6. Did the Revenue Commissioners provide training or updates on the impact of the 2002 legislation and legal developments to Revenue staff in 2002/2003?
7. How do the Revenue Commissioners explain the fact that nine senior members of staff failed to notice that both the €35m open market price and the €65,664,133 (as notified on 27th November 2002 and 6th February 2003) both failed the EVT?

8. What steps did the Revenue Commissioner take following receipt of CSID's High Court statement of claim and pleadings which stated that Revenue had assessed the VAT at €10,254,600 and that Dublin Waterworld Limited had refused to sign the 4A form?
9. What is the Revenue Commissioners view of CSID's liability in relation to Stamp Duty and incorrect VAT returns between 2000 and 2007?
10. Can the Revenue Commissioners confirm if at any stage, prior to the Supreme Court Judgment that they were aware of the correct legal position?
11. Have the Revenue Commissioners carried out a review of other leases which may have failed the EVT but where VAT was reclaimed?

Conclusion

There is no evidence whatsoever that the Revenue Commissioners provided any comfort whatsoever to CSID in relation to the VAT charge, nor does it appear that Revenue supported and advised CSID or other Government departments when the matter went to litigation.

Revenue's treatment of CSID appears to be far more lenient than other persons in the private sector might receive.

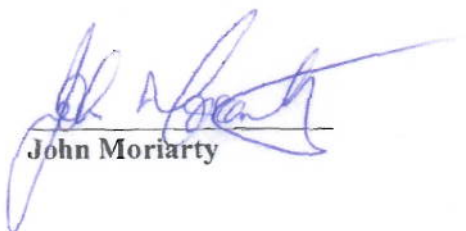
What is clear is that CSID and its advisors realised the implications of the EVT and set out to defeat it and began by concealing the report from DWW.

The Committee should be mindful that CSID had a board of directors as well as what the AG described as "*highly paid advisors*", and in my view these people must be made accountable.

Please note that all of the quotations above are taken directly from documents held by DWW and are available on request.

I look forward to assisting the Committee with this work.

Yours Sincerely



John Moriarty

